impression that the Court of Appeals would limit the doctrine of *State* v. *Toney* to the exact facts of that case. It is to be regretted that the court felt compelled to undertake the task of limitation. Conceding that this was a close case of statutory construction and recognizing that the principal case does not contradict the syllabus of the *Toney* case, it is submitted that the holding is not in harmony with the construction of the statute defining "anything of value" bearing the imprimatur of the Supreme Court, nor with the purpose and intent of the embezzlement statute. A. N. M.

Criminal Law — Factors to be Considered in Recommendation of Mercy

Defendant was convicted of murder in the first degree without a recommendation of mercy. Error was claimed in the trial court's charge to the jury on the recommendation of mercy and in its refusal to charge as requested by the defendant. The trial court answered a question propounded by the jury, as to whether or not they could consider "sociological matters and environment" in recommending or refusing to recommend mercy, by saying, "No, that has nothing to do with the case." The Supreme Court held that the jury's discretion was limited to the facts and circumstances of the case as disclosed by the evidence, and hence there was no error in the trial court's ruling.[1]

Ohio G.C. sec. 12400 provides that first degree murder "shall be punished by death unless the jury trying the accused recommend mercy . . . " The court in the principal case follows the rule of *Howell* v. *State*, holding that the jury is to be confined to the evidence in exercising its discretion to recommend or withhold mercy.[2] The majority opinion in that case is severely criticized by Judge Robinson in a strong dissenting opinion[3] which was based upon the absence of any indication in the statute of a legislative intent to control the discretion of the jury in any respect whatsoever.

Outside of Ohio the courts have held under similar statutes that the discretion of the jury in giving or withholding a recommendation of mercy is not confined or limited by any rule of law or by the evidence or testimony of the case.[4] The Georgia court has held that the discre-

[1] *State* v. *Caldwell*, 135 Ohio St. 424, 21 N.E. (2d) 343, 14 Ohio Op. 320 (1939).
[2] *Howell* v. *State*, 102 Ohio St. 411, 131 N.E. 76, 17 A.L.R. 1108 (1921).
[3] *Rehfeld* v. *State*, 102 Ohio St. 431, 131 N.E. 712 (1921); *Howell* v. *State*, 102 Ohio St. 411, at 424.
[4] *Inman* v. *State*, 72 Ga. 269 (1884); *State* v. *Mewhinney*, 43 Utah 135, 134 Pac. 632, Ann. Cas. 1916 C 532, L.R.A. 1916 D 590 (1913); *Cook* v. *State*, 46 Fla. 36, 35 So. 665 (1903); *Winston* v. *United States*, 172 U.S. 303, 43 L.Ed. 456, 19 Sup. Ct. 212 (1898); *State* v. *King*, 158 S.C. 251, 155 S.E. 409 (1903).

tion of the jury is not limited or confined in any case,[5] and that it may recommend mercy "for any reason that should occur" to it.[6] A South Carolina court has held it error to give examples of cases where the recommendation of mercy would be justified because these instructions would tend to limit the discretion of the jury.[7] The Supreme Court of the United States has indicated that under an Act of Congress[8] permitting a jury to add "without capital punishment" to a verdict of guilty of first degree murder, the jury may consider everything in its recommendation because the decision is "committed by Congress to the sound discretion of the jury and the jury alone."[9] In New Jersey, under a similar statute,[10] the court held that a recommendation of mercy was no part of the verdict and that the facts on which conviction was based are not necessarily connected with the recommendation, nor does this recommendation have to be suggested by the evidence.[11] However, the New Jersey Legislature after that decision amended the statute to confine the jury's discretionary power to the facts and circumstances presented in the evidence.[12] Probably this method would have been the better approach in Ohio.

It has been held to be the best policy in several states to instruct the jury as to its discretion in recommending or withholding mercy by reading the statute.[13] On this same ground, a mere reading of the statute to the jury, either upon request of counsel or upon the court's own motion, has been held to be sufficient instruction on the recommendation of mercy.[14] These same courts have held that it was error to instruct the jury that there must be mitigating circumstances to sustain a recommendation of mercy.[15] The fact that the recommenda-

[5] *Williams* v. *State*, 119 Ga. 425, 46 S.E. 626 (1903).

[6] *Duncan* v. *State*, 141 Ga. 4, 80 S.E. 317 (1913), *per curiam* opinion.

[7] *State* v. *Blakely*, 158 S.C. 304, 155 S.E. 408 (1930).

[8] Act of Congress, Jan. 15, 1897, c. 29 sec. 1, 29 Stat. 487.

[9] *Winston* v. *United States*, 172 U.S. 303, 43 L.Ed. 456, 19 Sup. Ct. 212 (1898). "How far considerations of age, sex, ignorance, illness, or intoxication, of human passions or weakness, of sympathy or clemency, or the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought to light, or any other consideration whatever, should be allowed weight in deciding the question whether the accused should or should not be capitally punished, is committed by the act of Congress to the sound discretion of the jury and of the jury alone."

[10] New Jersey Pub. Laws (1916) p. 576.

[11] *State* v. *Martin*, 92 N.J.L. 436, 106 Atl. 380, 17 A.L.R. 1090 (1919).

[12] New Jersey Pub. Laws (1919) p. 303; *State* v. *Carrigan*, 93 N.J.L. 268, 108 Atl. 365 (1919).

[13] *Garner* v. *State*, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232 (1891); *Lovett* v. *State*, 30 Fla. 142, 11 So. 550, 17 L.R.A. 705 (1892); *Denham* v. *State*, 22 Fla. 664 (1886); *Mann* v. *State*, 22 Fla. 600 (1886); *Cook* v. *State*, 46 Fla. 36, 35 So. 665 (1903); *Fogarty* v. *State*, 80 Ga. 450, 5 S.E. 782 (1888).

[14] *Fogarty* v. *State*, 80 Ga. 450, 5 S.E. 782 (1888); *Denham* v. *State*, 22 Fla. 664 (1886).

[15] *Cohen* v. *State*, 116 Ga. 573, 42 S.E. 781 (1902).

tion or non-recommendation is not reviewable by the appellate courts,[16] that some courts refuse to allow evidence directed specifically toward a recommendation of mercy,[17] and the statement that the recommendation of mercy is not an issue of the case,[18] coupled with the refusal of the courts to charge on such evidence,[19] would tend to indicate that this recommendation is not based on the evidence presented in the case, but rather on the jury's impression of the man himself.[20]

It has been said that "a career of crime, sociologically conceived, is the culmination of a complex series of inevitable forces at work in the physical and social environment of the individual."[21] This statement represents the almost universal present-day thought on this question. Hence, it would seem best that the courts allow the jury to follow the rule laid down by Saleilles. "When it comes to determining the penalty, it is the entire man in totality of his moral nature that must be considered and not the fragmentary and incidental part of himself that has found expression in the crime committed."[22]

E. P. T.

EQUITY

Equity — Mutuality in Specific Performance of Requirements Contracts

The plaintiff, a gasoline station owner and operator, bought and paid cash for stock in the defendant corporation, owner and operator of a bus line, under a contract whereby the defendant promised to buy, and plaintiff to sell, all the defendant's requirements of gasoline, oil and grease at reduced prices, so long as the plaintiff should hold the stock.[1] The plaintiff asked an injunction to prevent the defendant from purchasing his requirements elsewhere. The injunction was granted, the court holding that mutuality of obligation is not essential to the specific

[16] *Hoppe* v. *State*, 29 Ohio App. 467, 163 N.E. 715 (1928); *Aiken* v. *State*, 170 Ga. 895, 154 S.E. 368 (1930).

[17] *Ashbrook* v. *State*, 49 Ohio App. 298, 197 N.E. 214 (1935).

[18] *Ashbrook* v. *State*, 49 Ohio App. 298, 197 N.E. 214 (1935); *State* v. *Martin*, 92 N.J.L. 436, 106 Atl. 385, 17 A.L.R. 1090 (1919).

[19] *Supra*, note 16.

[20] *State* v. *Caldwell*, 13 Ohio Op. 98 (1938), overruled in 134 Ohio St. 424 (1939).

[21] Brill and Payne (1 ed. 1938), "The Adolescent Court and Crime Prevention," p. 13.

[22] Saleilles (1 ed. 1913), "Individualization of Punishment," p. 165.

[1] Note that this contract presents some features of an option, a unilateral contract, and a bilateral contract. If it is construed as a bilateral contract, plaintiff would be considered as promising in the alternative either to supply the defendant's requirements or to sell his stock. Since either performance would be sufficient consideration if it alone were bargained for, the promise is not illusory. 1 American Law Institute, Restatement of the Law of Contracts, §79.